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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AMERITECH CORPORATION, *et al.*,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF REGIONAL BELL COMPANIES IN SUPPORT OF CONDITIONAL CROSS-PETITION

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1. In their coordinated responses to our conditional cross-petition, the FCC, AT&T, and MCI have all agreed that Question One in the cross-petition is analytically inseparable from Question Two in the FCC's petition and that the Court should therefore review the former if it decides to review the latter.

Despite their acquiescence in Question One, petitioners have gratuitously argued at some length that they should prevail on the merits of that issue. We see no need to respond to those arguments at this time, except to note that they underscore the very point of the cross-petition. If petitioners have their way, competitors like AT&T and MCI will be free to purchase, at the cost-based rates reserved for unbundled network elements, a fully preassembled package of network elements equivalent to a

finished end-to-end telecommunications service. Although Congress directed local exchange carriers to offer such finished telecommunications services to their competitors for resale, it specified that the rate should be based *not* on the cost of the individual unbundled network elements, but rather on a discount off of the retail rate to reflect the costs that a local carrier avoids by selling its services at wholesale. 47 U.S.C. § 252(d)(3). Under petitioners' view of the world, a competitor can purchase a finished service at *either* a wholesale discount off the carrier's retail rate *or* the cost-based rate for network elements, *whichever is lower*. Their reading of the statute would simply nullify the crucial distinction between unbundled network elements and resale.

For the reasons stated in our opposition to certiorari, we believe that neither Question Two in the FCC's petition nor Question One in our conditional cross-petition merits review by this Court. All parties now agree, however, that the Court could not intelligibly consider the first without also considering the second.

2. Although petitioners pretend that Question Two in our conditional cross-petition has nothing to do with Question One, the two issues are analytically inseparable.

Question Two, like Question One, asks whether the FCC may lawfully negate the fundamental statutory distinction between unbundled network elements and finished telecommunications services. Indeed, Question Two presents the issue in an even simpler form. No one disputes that local exchange carriers provide "vertical services" such as caller ID and call-forwarding directly to the public as retail telecommunications services. The statute plainly permits a competing carrier to purchase such services for resale at a wholesale discount. According to petitioners, however, the FCC can properly define such finished services as "network elements," and carriers must therefore *also* offer the services to competitors for resale at *cost-based* rates. As we have explained both in our opposition

to certiorari and in our arguments in support of Question One in our conditional cross-petition, that theory makes nonsense of the statutory text and structure. The question it raises, moreover, is indistinguishable from that raised by Question One in the cross-petition.

Petitioners' effort to drive a wedge between the two is entirely artificial and self-serving. Their merits argument is that vertical services can be characterized as "features" of a switch, that switches themselves are network elements subject to the unbundling requirement, and that switching features must therefore also be subject to the unbundling requirement. But this semantic game-playing makes no difference to the analysis. The fundamental issue remains the same: must incumbent carriers offer their competitors a finished telecommunications service at the cost-based rate for an unbundled network element? Petitioners' affirmative answer to that question might have been supportable if Congress had adopted the House Bill's unbundling provision: it would have required incumbent carriers to unbundle "services, elements, features, functions, and capabilities." § 242(a)(2), H.R. 1555, 104th Cong., 1st Sess. (Oct. 12, 1995); *see also* § 251(b)(1), S. 652, 104th Cong., 1st Sess. (June 23, 1995) (requiring carriers to unbundle "network functions *and services*"). But the Conference Committee chose to eliminate the term "services" when it defined the scope of unbundling, and that term appears nowhere in the Act's unbundling provisions.

Apart from the merits, petitioners claim that this statutory issue involves merely "the Eighth Circuit's straightforward application of [*Chevron*]." MCI Resp. 8. But that, of course, is equally true of Question Two in the FCC's petition—and that is why review should not be granted on that question. The point is that *if* the Court nonetheless grants plenary review to consider the Eighth Circuit's routine application of *Chevron* to Rule 51.315(b), it should likewise review the Eighth Circuit's application

of *Chevron* to other rules that rest on the same central statutory question—namely, whether the FCC may effectively negate the distinction between access to unbundled network elements at cost-based rates and the purchase of retail telecommunications services for resale at wholesale rates.

CONCLUSION

If the Court grants Question Two of the FCC's petition, it should grant both questions presented in the conditional cross-petition.

Respectfully submitted,

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